Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1392

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., METRO-GOLDWYN-MAYER, INC., PARAMOUNT FILM DISTRIBUTING CORP., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., WARNER BROTHERS DISTRIBUTING CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No.

EXHIBITORS POSTER EXCHANGE, INC.,
Petitioner

versus

NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES CORP., METRO-GOLDWYN-MAYER, INC., PARAMOUNT FILM DISTRIBUTING CORP., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., WARNER BROTHERS DISTRIBUTING CORP.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner herein, Exhibitors Poster Exchange, Inc., respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 10, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 543 F. 2d 1106, and is reproduced at Appendix A, infra. p. A-1.

The Judgment of the Court of Appeals is reproduced at Appendix B, infra. p. A- 4 . There was no written opinion by the United States District Court for the Eastern District of Louisiana. The trial Judge stated orally his reasons for rendering judgment for respondents. A copy of the transcript of such reasons is reproduced at Appendix C, infra. p. A-7 . A copy of the judgment of the District Court is reproduced at Appendix D, infra. p. A-10.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1976, (Appendix B, infra. p. A- 4) and petitioner's timely application for a rehearing (Appendix E, infra. p. A- 12) was denied on January 10, 1977, (Appendix F, infra. p. A- 15) This petition for certiorari is being filed less than 90 days from the date last abovementioned. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a summary judgment entered without any trial on findings of fact can have collateral estoppel effect.

2. Whether the decision of the court below giving collateral estoppel effect to a summary judgment, has the effect of undermining enforcement of the federal antitrust laws.

3. Whether the decision below is in conflict with the opinion delivered by the court in the case of *Lawlor*

v. National Screen Service Corp., 349 U.S. 322 (1955).

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209 (15 U.S.C. 731 and 737 (15 U.S.C. Sections 15 and 16) are reproduced at Appendix G, infra. p. A-16.

STATEMENT OF THE CASE

This is an action by Petitioner for treble damages and injunctive relief for alleged violation of sections 1 and 2 of the Sherman Antitrust Act. The action was commenced in the United States District Court for the Eastern District of Louisiana under sections 4 and 16 of the Clayton Act, upon which jurisdiction of the said District Court is based (See Appendix G, infra. p. A-16).

The court below dismissed this action on the ground that a summary judgment, dismissing a prior action between the same parties, entered without any trial or findings of fact, had the collateral estoppel effect of requiring entry of a summary judgment of dismissal of this action.

ARGUMENT

In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326, this Court, quoting with approval a statement made by the Court of Appeals, said:

> "No question of collateral estoppel by the former judgment is involved because the case was never tried and there was not, therefore, such finding

of fact which will preclude the parties to that litigation from questioning the finding thereafter."

It is therefore correct to say that the judgment entered by the court below in this case is in plain conflict with an opinion written by this Court.

CONCLUSION

It is therefore submitted that this petition for issuance of a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 10, 1976, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for a Writ of Certiorari have been served on Phillip A. Wittmann, 1000 Whitney Bank Building, New Orleans, Louisiana 70130; Walter S. Beck, 40 West 57th Street, New York, New York 10019; and Gibbons Burke, One Shell Square 70139, on this 5th day of April, 1977.

C. ELLIS HENICAN, JR.

APPENDIX A

OPINION OF CIRCUIT COURT OF APPEALS - FIFTH CIRCUIT

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant

v.

NATIONAL SCREEN SERVICE CORPORATION, et al.,
Defendants-Appellees.

No. 76-2463
Summary Calendar*

United States Court of Appeals, Fifth Circuit

Dec. 10, 1976

Plaintiff in antitrust action appealed from a summary judgment rendered against it in the United States District Court for the Eastern District of Louisiana, Alvin B. Rubin, J. The Court of Appeals held that a previously rendered summary judgment could have collateral estoppel effect; and where that precise issue had been decided against plaintiffs on a prior appeal in an earlier lawsuit, the defendants' motion for damages for frivolous appeal would be granted and the district court required to determine the amount of costs and damages.

Affirmed and remanded.

---

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part 1.

1. Judgment 653

Summary judgment could have collateral estoppel effect.

2. Courts 406.9(9)
Federal Civil Procedure 2747

Where only issue raised by appellants had been decided against them on prior appeal in earlier lawsuit, appellees' motion for damages for frivolous appeal would be granted and case remanded to district court to determine amount of costs and damages to be paid appellees. 28 U.S.C.A. §1912; Fed. Rules App. Proc. rule 38, 28 U.S.C.A.

3. Courts 403, 404(1)

Court of Appeals did not have jurisdiction to consider appellees' motion for injunction prohibiting appellant from future litigation against them based on same cause of action where there was no final or otherwise appealable decision of district court; nor could it be considered application for exercise of supervisory authority because relief sought was not in aid of Court of Appeals' jurisdiction. 28 U.S.C.A. §§1291, 1292, 1651.

. . . . . .

Appeal from the United States District Court for the Eastern District of Louisiana.

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM.

[1] This appeal arises out of antitrust litigation of many years' duration. The history of this litigation is outlined in *The Poster Exchange, Inc. v. National Screen Service Corporation, et al.*, 5 Cir., 1976, 542 F.2d 255 (No. 76-1870, Nov. 11, 1976, slip opinion p. 6517). Once again the appellant, Exhibitors Poster Exchange, Inc., urges that a summary judgment cannot have collateral estoppel effect. The same argument was urged to us and decided against this same appellant in *Exhibitors Poster Exchange, Inc., v. National Screen Service Corporation, et al.*, 5 Cir., 1975, 517 F.2d 110, cert. denied, 423 U.S. 1054, 96 S.Ct. 784, 46 L.Ed. 2d 643 (1976).

We said in that opinion:

> "It would be strange indeed if a summary judgment court not have collateral estoppel effect. This would reduce the utility of this modern devide to zero." 517 F.2d at 115.

Despite our pronouncement, despite our denials of rehearings by panel and *en banc*, and despite the Supreme Court's declining certiorari in this matter, the appellant nevertheless began yet another lawsuit in the district court which, upon its termination by summary judgment in favor of the yet-again appellees, confronts us with precisely the same issue. In its brief the appellant states that it is relitigating the same issue with admitted forlorn hope that we will overrule our previous decision.

[2] The appellees have filed in this Court a motion for

damages for frivolous appeal under Rule 38, F.R.A.P. The motion is well taken. Appellees have again been required to file pleadings and brief, incur costs and attorneys' fees to protect their interests. These expenses were necessitated only by frivolous litigation. We remand this case to the district court to determine the amount of costs and damages to be paid to the appellees, as provided by 28 U.S.C. § 1912.

[3] Appellees have also filed a motion for an injunction prohibiting the appellant from future litigation against them based on the same cause of action. The motion is filed of first instance in this Court. We are without jurisdiction to consider this request since there is no final or otherwise appealable decision of the district court. 28 U.S.C.§ §1291, 1292; *Wooten v. Bomar*, 6 Cir., 1959, 266 F.2d 27. Nor can it be considered an application for the exercise of our supervisory authority because the relief sought is not in aid of our jurisdiction. 28 U.S.C. § 1651.

The judgment of the district court is affirmed and the case is remanded for a determination of damages and costs.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-2463
Summary Calendar

D.C. Docket No. CA 75-2503 "C"

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant

versus

NATIONAL SCREEN SERVICE CORPORATION,
ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here order-

ed and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed and that this cause be and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 10, 1976

Issued as Mandate:

APPENDIX C

EXCERPTS FROM TRANSCRIPT

THE COURT:

Thank you.

I'm going to grant the motion for summary judgment.

It seems to me that the matter is controlled by the Fifth Circuit Court of Appeals decision in Exhibitors Poster Exchange, Inc. versus National Screen Service Corporation, 517 Federal Second 110. Taking the position most favorable to the Plaintiff, which is supported not by affidavits or depositions, but by the pleadings as he elaborated, by the statement of counsel for the Plaintiff this morning, the Plaintiff contends that illegal acts were performed prior to the institution of the various prior lawsuits, and those illegal acts have continued to a time beyond the termination of the other lawsuits and that damages have been suffered at a time subsequent to the commencement of the other lawsuits.

Now, that breaks down into two separate issues. One is that the Plaintiff may sue for the acts committed after the last lawsuits on the basis they were illegal; but the legality or illegality vel non of those self-same acts has been determined. In the discussion in this regard at Page 114 II of the Exhibitors Poster Exchange suit deals with that issue. The whole purpose of the notion of collateral estoppel, as distinguished from the doctrine of res judicata, is that while res judicata pertains only to the self-same events and

the force of a decision on them, collateral estoppel is a broader doctrine and reaches to similar acts or identical acts performed at a different time so long as the parties were the same. "Collateral estoppel bars a Plaintiff from assailing the Defendants for proceeding without change upon the course of conduct previously held lawful against Plaintiff's identical attack." That's at 517 Federal Second 114.

Now, as to whether or not the monopolistic practice alleged to have continued was lawful or unlawful, collateral estoppel bars that claim; if, indeed, the acts were lawful and now contended to be lawful, then the mere fact that they caused additional damages would not, of course, give rise to a new cause of action.

The suggestion is made in the memorandum that collateral estoppel as a legal doctrine is inapplicable if there has been no trial on the merits of the case. That position is rejected by the Fifth Circuit in the Exhibitors Poster Exchange suit, and I quote from their opinion at Page 115: "We reject out of hand the beguiling but superficial contention of Exhibitors that neither suit one nor number two can have any collateral estoppel effect because no summary judgment can have such effect." And then, the Court continues to explain the reason for its rejection out of hand.

If the Fifth Circuit rejects the argument out of hand officiary, I must do so. Motion is granted.

Thank, you gentlemen.

MR. WITTMANN: Thank you, Your Honor.

* * * * * *

REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter for the United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his Stenograph notes during the proceedings on the 14th day of April, 1976.

New Orleans, Louisiana, this 21st day of April, 1976.

s/ M. H. Gaudet, Jr.
M. H. Gaudet, Jr.,
Official Court Reporter

APPENDIX D

JUDGMENT OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

EXHIBITORS POSTER EXCHANGE, INC.
versus
NATIONAL SCREEN SERVICE CORPORATION, COLUMBIA PICTURES INDUSTRIES, INC., METRO-GOLDWYN-MEYER, INC., PARAMOUNT PICTURES CORPORATION, TWENTIETH CENTURY-FOX DISTRIBUTING CORP., UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC. and WARNER BROS. DISTRIBUTING CORPORATION

Filed: April 15, 1976

JUDGMENT

The court having previously granted the motion for summary judgment by defendants,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, National Screen Service Corporation, Columbia Pictures Industries, Inc., Metro-Goldwyn-Meyer, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Distributing Corp., United Artists Corporation, Universal Film Exchanges, Inc. and Warner Bros. Distributing Corporation, and against plaintiff, Exhibitors Poster Exchange, Inc., dismissing plaintiff's suit at its costs.

Dated at New Orleans, Louisiana, this 13th day of April, 1976.

s/ Nelson B. Jones
NELSON B. JONES, CLERK

APPROVED AS TO FORM:

s/ Alvin B. Rubin
UNITED STATES DISTRICT JUDGE

Francis T. Anderson, Esq.
Glenn B. Hester, Esq.
C. Ellis Henican, Jr., Esq.

Gibbons Burke, Esq.

Walter S. Beck, Esq.

Phillip A. Wittman, Esq.

APPENDIX E

PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

EXHIBITORS POSTER EXCHANGE, INC.
Plaintiff-Appellant

versus

NO. 76-2463

NATIONAL SCREEN SERVICE CORPORATION, ET ALS.,
Defendants-Appellees

PETITION FOR REHEARING

It is respectfully submitted that a rehearing should be granted because of the fact that the Court has not distinguished - or even mentioned - the authorities cited in plaintiff's brief.

More fully, plaintiff has cited the Supreme Court case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, and Restatement of Judgments, sec. 68, Comment C. (See page 5 of plaintiff's original brief.)

Plaintiff contends that the judgment appealed from is in direct conflict with these authorities, and therefore it appears that they have been overlooked by the Court.

It is therefore submitted that a rehearing should be granted in order that the authorities relied on by the plaintiff may be considered by the Court.

Respectfully submitted,

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s/ C. Ellis Henican, Jr.
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ATTORNEYS FOR PLAINTIFF-APPELLANT

CERTIFICATE OF SERVICE

I certify that copies of the above and foregoing Petition for Rehearing have been forwarded to opposing counsel by depositing said copies in the U.S. Mail with proper postage affixed, on this 22d day of December, 1976.

s/ C. Ellis Henican, Jr.
C. ELLIS HENICAN, JR.

APPENDIX F

PETITION FOR REHEARING

Filed: January 10, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2463

EXHIBITORS POSTER EXCHANGE, INC.,
Plaintiff-Appellant

Versus

NATIONAL SCREEN SERVICE CORPORATION, ET AL.,
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING
(JANUARY 10, 1977)

Before COLEMAN, GOLDBERG and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
S/ IRVING L. GOLDBERG
United States Circuit Judge

APPENDIX G

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2:

Section 1.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with Foreign nations, is declared to be illegal. . .Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sections 4 and 16 of the Clayton Act, 28 Stat. 731 and 737, 15 U.S.C. Sections 15 and 26:

Section 4.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.